DOCKET NO. HHD CV 21-6140309 SUPERIOR COURT

GREGORY B. SMITH ET AL. JUDICIAL DISTRICT

v. OF HARTFORD

AARON SUPPLE ET AL. NOVEMBER 16, 2021

MEMORANDUM OF DECISION RE: DEFENDANTS' MOTION TO DISMISS

The issue before the court is whether it should grant defendants Aaron Supple, Karen Montejo, Hendrick Xiong-Calmes, and Giana Moreno's special motion to dismiss counts one, two, three, four, thirteen, and fourteen of the plaintiffs' complaint, which allege libel per se, and libel per quod.[1] That motion is based on General Statutes § 52-196a, Connecticut's anti-strategic litigation against public participation statute. Defendants claim that the statute mandates dismissal of plaintiffs' claims because they are based upon the defendants' exercise of free speech and the right of association, which are protected by the first amendment to the United States constitution. The court does not agree and the motion is denied.

The plaintiffs, Gregory B. Smith, Nicholas Engstrom, and The Churchill Institute, Inc., in the seventeen count complaint they filed on April 5, 2021, allege the following facts. On April 10, 2019, defendants Aaron Supple, Karen Montejo, Hendrick Xiong-Calmes, and Gianna Moreno posted multiple flyers on Trinity College's campus in Hartford, Connecticut, that featured plaintiff The Churchill Institute, Inc.'s logo and a photograph of plaintiff Gregory B. Smith with the phrase, "the new racism is every bit as ugly as the old," above Smith's photograph. Identical

[1]Although the defendants also request dismissal of counts sixteen and seventeen, which lie in infliction of emotional distress, in their memorandum of law, the motion to dismiss does not name them.

flyers featuring a photograph of plaintiff Nicholas Engstrom were also posted by the defendants. Trinity College investigated and found that the defendants created, printed, and published the flyers.

On May 20, 2021, the defendants filed a special motion to dismiss pursuant to General Statutes § 52-196a on the grounds that Connecticut's anti-strategic litigation against public participation (anti-SLAPP) statute mandates dismissal of plaintiffs' defamation claims because those claims are based on the defendants' exercise of free speech and the right of association in connection with a matter of public concern, which are protected by the first amendment to the United States constitution,[2] and because the plaintiffs cannot demonstrate probable cause that they will prevail on the merits of any of their claims. The motion is accompanied by a memorandum of law. The plaintiffs filed an objection to defendants' special motion to dismiss, memorandum of law, and affidavits in support of their objection on July 6, 2021. The defendants filed a reply memorandum and supporting affidavits on July 16, 2021. The court heard oral argument, remotely, on July 21, 2021. On August 3, 2021, the movants filed an additional affidavit, with the court's permission.

Connecticut's anti-SLAPP statute, codified in General Statutes § 52-196a, provides in relevant part that "[i]n any civil action in which a party files a complaint, counterclaim or cross claim against an opposing party that is based on the opposing party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the

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[2] The defendants frame their special motion to dismiss solely on first amendment grounds, based both upon the language of the motion and the accompanying memorandum of law referenced in the motion. Accordingly, the court will limit its review to the United States constitution.

United States or the Constitution of the state in connection with a matter of public concern, such opposing party may file a special motion to dismiss the complaint, counterclaim or cross claim." "'Right of free speech' means communicating, or conduct furthering communication, in a *public forum* on a matter of public concern . . . ." (Emphasis added.) General Statutes § 52-196a (a) (2). "'Matter of public concern' means an issue related to (A) health or safety, (B) environmental, economic, or community well-being, (C) the government, zoning and other regulatory matters, (D) a public official or public figure, or (E) an audiovisual work." General Statutes § 52-196a (a) (1). "'Right of association' means communication among individuals who join together to collectively express, promote, pursue or defend common interests . . . ." General Statutes § 52-196a (a) (4).

"In deciding a special motion to dismiss pursuant to § 52-196a, the court undertakes a two-prong burden shifting analysis. Under the first prong of the analysis, the moving party has the initial burden to show by a preponderance of the evidence that the opposing party's complaint falls within the scope of the statute. . . . Specifically, the plaintiff's claims must be based on the defendant's right to free speech, right to petition the government, or right to free association. Further, the defendant's exercise of his or her right must relate to a matter of public concern. Section 52-196a (a) defines 'right of free speech,' 'right to petition the government,' 'right of association,' and 'matter of public concern.' In other words, the plaintiff's claims fall within the scope of the statute if the defendant was exercising a right defined in § 52-196a (a) on a matter of public concern. . . . Once the moving party makes the initial showing by a preponderance of the evidence, [t]he court shall grant a special motion to dismiss . . . unless the party that brought the

complaint, counterclaim or cross claim sets forth with particularity the circumstances giving rise to the complaint, counterclaim or cross claim and demonstrates to the court that there is probable cause, considering all valid defenses, that the party will prevail on the merits of the complaint, counterclaim or cross claim." (Citation omitted; internal quotation marks altered.) *Reid* v. *Harriman*, Superior Court, judicial district of Fairfield, Docket No. CV-19-6083510-S (October 28, 2019, *Welch, J.*). "When ruling on a special motion to dismiss, the court shall consider pleadings and supporting and opposing affidavits of the parties attesting to the facts upon which liability or a defense, as the case may be, is based." General Statutes § 52-196a (e) (2).

The defendants first argue that they have met their burden under the first prong of the court's analysis because the plaintiffs' complaint is based upon the defendants' exercise of the right of free speech in a public forum in connection with a matter of public concern. The plaintiffs reply, inter alia, that the special motion to dismiss must be denied because the defendants' communications were not made in a public forum. The General Statutes do not define "public forum."

Although the court reads no ambiguities in § 52-196a, the court does note that the thrust behind Connecticut's adoption of the anti-SLAPP statute was to promote free speech and reporting by broadcasters and news organizations by enabling courts to dismiss at an early stage frivolous lawsuits that seek to chill reporting and to force the defendant to pursue settlement, rather than spending money on attorneys' fees and litigation to fight those baseless claims. Conn. Joint Standing Committee Hearings, Judiciary, Pt. 8, 2017 Sess., p. 38-39. The Connecticut version of the statute is modeled on language contained in California, Oregon, Texas, and Washington's anti-SLAPP statutes. Conn. Joint Standing Committee Hearings, supra, p. 38.

Oregon and California's anti-SLAPP statutes provide similar language as § 52-196a (a), but specifically include "[a]ny oral statement made, or written statement or other document presented, in *a place open to the public* or a public forum in connection with an issue of public interest"; (emphasis added.) Or. Rev. Stat. § 31.150 (2) (c); and "any written or oral statement or writing made in *a place open to the public* or a public forum in connection with an issue of public interest . . . ." (Emphasis added.) Cal. Civ. Proc. Code § 425.16 (e) (3). The court notes that § 52-196a (a) explicitly omits "a place open to the public" language. Texas, by contrast, has no "place open to the public" or "public forum" language in its anti-SLAPP statute. See Tex. Civ. Prac. & Rem. Code Ann. § 27.005. Washington's anti-SLAPP statute, in effect at the time Connecticut's was drafted, has since been repealed.

This court will look to relevant case law to determine whether Trinity College's campus constitutes a public forum. The first amendment provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble . . . ." "The freedom of speech . . . secured by the [f]irst [a]mendment . . . against abridgment by the United States is similarly secured to all persons by the [f]ourteenth against abridgment by the state." *Schneider* v. *New Jersey*, 308 U.S. 147, 160, 60 S. Ct. 146, 84 L. Ed. 155 (1939). "It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. . . . Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such

protection or redress is provided by the Constitution itself." (Citation omitted.) *Hudgens* v. *National Labor Relations Board*, 424 U.S. 507, 513, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976). "It is well established that the [f]irst [a]mendment protects speech rights only against government infringement. . . . Except where a private property owner's activities rise to the level of State action, the [f]irst [a]mendment does not prohibit speech limitations by an owner of private property, even where that property is open to the public, such as a shopping mall that serves the same purposes as a city business district." (Citation omitted.) *Roman* v. *Trustees of Tufts College*, 461 Mass. 707, 712, 964 N.E.2d 331 (2012).

A private college or university is not a state actor for purposes of triggering the application of first amendment protections. See *Grafton* v. *Brooklyn Law School*, 478 F.2d 1137, 1143 (2d Cir. 1973) ("No student could reasonably think that in giving and grading examinations, Brooklyn Law School was acting as an arm of New York State."); *Huff* v. *Notre Dame High School of West Haven*, 456 F. Supp. 1145, 1146-50 (D. Conn. 1978) (holding no state action for federal or state constitutional purposes in private high school's action expelling student under theories of "state entanglement" or "state function" where school was accredited by the state, held tax-exempts status, and received federal, state, and town financial aid). Because a private college is not a state actor, the public forum doctrine does not apply in the present case and the court need not perform a forum analysis.

The defendants do not provide any legal authority supporting the proposition that a private college is a state actor or that a private college's campus is a public forum in the first amendment context. All of the cases cited by the defendants in support of their argument that Trinity College's campus is a public forum for first amendment purposes are easily

distinguishable. *Widmar* v. *Vincent*, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981) and *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) concerned a public state university and a public high school, respectively, and not a private college like Trinity College. *Roman* v. *Trustees of Tufts* College, supra, 461 Mass. 707, *Commonwealth* v. *Tate*, 495 Pa. 158, 432 A.2d 1382 (1981), and *State* v. *Schmid*, 84 N.J. 535, 423 A.2d 615 (1980), were all decided on state constitutional grounds for their respective jurisdictions.

Although the New Jersey Supreme Court decided the issue of whether Princeton University's campus is a public forum on state constitutional grounds, that court clearly indicated that a private university campus is not a public forum subject to first amendment obligations under United State Supreme Court precedence. See *State* v. *Schmid*, supra, 84 N.J. 542-53. As to state action, The *Schmid* court noted that "Princeton University is, indisputably, predominantly private, unregulated and autonomous in its character and functioning as an institution of higher education. The interface between the University and the State is not so extensive as to demonstrate a joint and mutual participation in higher education or to establish an interdependent or symbiotic relationship between the two in the field of education. Moreover, the degree of State regulation does not evince a 'close nexus' between the State and Princeton University's policies, particularly with regard to the public's access to the University campus and facilities and, even more particularly, with regard to either the distribution of political literature or other expressional activities on University property." Id., 548. As to Princeton University's "public function," the *Schmid* court stated "it would be difficult to conclude under the circumstances . . . that Princeton

University is directly subject to [f]irst [a]mendment strictures. . . . [I]n assessing the availability of alternative means of communication, there are public streets, sidewalks, parking areas, and a train station immediately contiguous to Princeton University's main campus and most of its buildings and facilities; a major street with public sidewalks bisects the University campus. These numerous public areas apparently furnish to members of the public, as well as the college community, ample alternative locations other than the property of the University itself as means for dissemination and exchange of information views, and ideas. . . . [I]t must be recognized that the public uses and expressional activities that are permitted by the University are subordinate to its overall educational policies. In this sense, while the invitation to the public is broad, it is not truly open-ended or for any and all purposes. . . . Therefore, although Princeton University's raison d'etre is more consonant with free speech and assembly principles than a shopping center's purposes might be, the attachment of [f]irst [a]mendment requirements to the University by virtue of the general public's permitted access to its property would still be problematic." (Citations omitted; internal quotation marks omitted.) Id., 550-51. Lastly, as to the "company town doctrine" under *Marsh* v. *Alabama*, 326 U.S. 501, 506, 66 S. Ct. 276, 90 L. Ed. 265 (1946), the *Schmid* court noted that "[t]he nature of college community life as determined by Princeton University, even with its residential characteristics, would not seem to invest the University with the fundamental attributes of a government substitute or surrogate in the manner deemed critical for positing state action [as] in *Marsh* v. *Alabama* . . . . A private educational institution such as Princeton University involves essentially voluntary relationships between and among the institution and its students, faculty, employees, and other affiliated personnel, and the life and activities of the individual members of this community are directed and shaped by their shared

educational goals and the institution's educational policies. The public's invitation to use college facilities is incident to the educational life of the institution and must comport and be integrated with its educational endeavors. It is dubious therefore whether Princeton can or should be regarded as a quasi-governmental enclave or the functional equivalent of a 'company town,' which has all of the characteristics of a municipality, for [f]irst [a]mendment purposes." (Citation omitted.) *State* v. *Schmid*, supra, 84 N.J. 552. As one of the 'little ivies,' Trinity College's educational goals and policies and its urban campus in Hartford are akin to Princeton University's goals, policies, and campus setting, and the analysis, therefore, should produce a similar outcome.

In the present case, the defendants' special motion to dismiss relies upon the United States constitution. The court finds that Trinity College's campus is not a public forum for first amendment purposes.

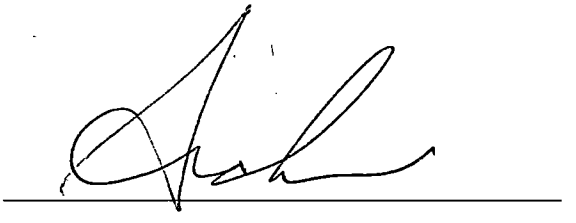
Because Trinity College's campus is not a public forum, the defendants cannot meet their burden on the first prong of the court's analysis on the ground that the plaintiffs' complaint is based on the defendants' right to free speech as defined by § 52-196a (a) (2).

The defendants next argue, in the alternative, that they have met their burden under the first prong of the court's analysis because the plaintiffs' complaint is based on the defendants' exercise of the right of association in connection with a matter of public concern. The plaintiffs reply that their complaint is not based on the defendants' right of association under the first amendment.

"Although not expressly enumerated in the first amendment, the right of association has been recognized as a fundamental right under the first amendment . . . ." *State* v. *Bonilla*, 131 Conn. App. 388, 394, 28 A.3d 1005 (2011). The United States Supreme Court has "afforded constitutional protection to freedom of association in two distinct senses. First, the Court has held that the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships. Second, the Court has upheld the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities." *Board of Directors of Rotary International* v. *Rotary Club of Duarte*, 481 U.S. 537, 544, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987). The Supreme Court, however, has cautioned that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the [f]irst [a]mendment." *Dallas* v. *Stanglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989).

In the present case, the defendants' posting of flyers on Trinity College's campus and this subsequent lawsuit do not involve any governmental inference with the defendants' choice to enter into and maintain intimate or private relationships. Nor does the defendants' conduct in posting flyers constitute an engagement in protected speech. Trinity College is not a public forum for first amendment purposes. The defendants cannot meet their burden on the first prong of the court's analysis on the ground that the plaintiffs' complaint is based upon the defendants' right of association under the United States constitution.

Because Trinity College, as a private college, is not a state actor and its campus does not constitute a public forum for first amendment purposes, the plaintiffs' complaint is not based upon the defendants' right to free speech or right to free association. The defendants cannot meet their burden under the first prong of the court's analysis in deciding a special motion to dismiss pursuant to § 52-196a because they cannot show by a preponderance of the evidence that the plaintiff's complaint falls within the scope of the statute. For all the reasons stated above, the defendants' motion to dismiss is DENIED.



James T. Graham, J.T.R.

Checklist for Clerk

Docket Number: HHD CV21-6140309

Case Name: Smith v. Supple

Memorandum of Decision dated: 11/16/2021

File Sealed: **Yes** **No** X

Memo Sealed: **Yes** **No** X

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Case Information 2
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HHDCV216140309S SMITH, GREGORY B. V. SUPPLE, AARON **RD:** 4/20/2021
TL: **No** Ty:**T50** PS:**HD2** Future Trial Date: 4/20/2023 [WFQ-NewEntry]
- Paperless File

CASE INFORMATION

Case Type	High Entry	Last Action
T50 - Defamation	127.00	08/03/2021
Count of Entries	**Entry Fee**	**Times On Short Calendar**
Non-Resact: 9 Resact: 35 Total: 44	$360.00	SC: 6 FSM: 0

TRIAL LIST / STATUS INDICATORS

Type	Priv	Caseflow Marking	CFMK Date
		A1	04/20/2023

DISPOSITION

Date	Code	Judge

Key Point	Date
File Date	04/05/2021
Writ Entry Coded	04/05/2021
Return Date	04/20/2021
Trial List Claim Coded	
Marking Date	04/20/2023
Verdict/Trial Complete	
Init Disp Coded	
Disposition Date	
Appeal-Int Filed	
Appeal-S/C Filed	
Disp of Appeal	
Last Action	08/03/2021

PARTY/APPEARANCE INFORMATION

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P-02 NICHOLAS ENGSTROM
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D-01 AARON SUPPLE
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D-02 KAREN MONTEJO
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	ATTY: PHV JACKSON ALEXANDRA 5/28/21 (442405) SHEPPARD MULLIN 1901 AVE OF THE STARS LOS ANGELES CA 90067 Filed: 6/17/2021 Phone: 3102283700
D-03	**HENDRICK XIONG-CALMES** Defendant **ATTY: ROBINSON & COLE LLP**(050604) 280 TRUMBULL STREET HARTFORD CT 06103 Filed: 4/20/2021 Phone: **ATTY: PHV RAYGOR KENT R 5/28/21** (442404) SHEPPARD MULLIN 1901 AVE OF THE STARS LOS ANGELES CA 90067 Filed: 6/17/2021 Phone: 3102283700 **ATTY: PHV JACKSON ALEXANDRA 5/28/21** (442405) SHEPPARD MULLIN 1901 AVE OF THE STARS LOS ANGELES CA 90067 Filed: 6/17/2021 Phone: 3102283700
D-04	**GIANNA MORENO** Defendant **ATTY: ROBINSON & COLE LLP**(050604) 280 TRUMBULL STREET HARTFORD CT 06103 Filed: 4/20/2021 Phone: **ATTY: PHV RAYGOR KENT R 5/28/21** (442404) SHEPPARD MULLIN 1901 AVE OF THE STARS LOS ANGELES CA 90067 Filed: 6/17/2021 Phone: 3102283700 **ATTY: PHV JACKSON ALEXANDRA 5/28/21** (442405) SHEPPARD MULLIN 1901 AVE OF THE STARS LOS ANGELES CA 90067 Filed: 6/17/2021 Phone: 3102283700
D-05	**HUNTER SAVERY *REMOVED*** Defendant **NONAPPEARING**
D-06	**GILLIAN REINHARD *REMOVED*** Defendant **NONAPPEARING**
D-07	**THE TRINITY TRIPOD *REMOVED*** Defendant **NONAPPEARING**

NON-RESACT ELECTRONIC DOCUMENTS

#	File Date	Filed By	Description
1	4/5/2021	002702	**SUMMONS**
2	4/5/2021	002702	**COMPLAINT**
3	4/5/2021	002702	**ADDITIONAL PARTIES PAGE**
4	4/20/2021	439334	**APPEARANCE** Appearance
5	4/20/2021	050604	**APPEARANCE** Appearance